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738-008—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 193

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (IV R. 920–928;[1] Pet. App. 29–37) is reported at 330 F. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1964 (IV R. 929). Petitions for rehearing were denied on April 21, 1964 (IV R. 942–943, 944; Pet. App. 39–40). On May 15, 1964, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 20, 1964, and

[1] "R." designates the four-volume record on file with the Clerk of this Court. Also lodged with the Clerk is the original trial transcript and the hearings on the motions to suppress.

the petition was filed on June 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ruling that presumptions applicable to certain petitioners on certain counts were invalid required reversal as to all petitioners on all counts.

2. Whether the search warrant was rendered invalid because it rested in part upon information obtained as a consequence of a trespass over property neither owned by, nor in the possession of, petitioners and on which petitioners were not present at the time of the trespass.

3. Whether government agents improperly destroyed some of the paraphernalia of an illegal distillery found at the still site.

4. Whether petitioners were denied access to statements producible under 18 U.S.C. 3500.

5. Whether the failure of the government to transcribe the testimony of all the witnesses who testified before the grand jury is a ground for reversal of the convictions.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted under an indictment (I R. 30–32) charging substantive violations of the provisions of the Internal Revenue Code relating to distilled spirits, and conspiracy to violate one of these provisions. Count One charged petitioners Frank Romano and John Ottiano with possession, custody and control of an unregistered

still and distilling apparatus (26 U.S.C. 5601(a)(1)); Count Two charged each of the petitioners with illegal production of distilled spirits (26 U.S.C. 5601 (a)(8)); and Count Three charged that all conspired together to produce distilled spirits illegally (18 U.S.C. 371; 26 U.S.C. 5601(a)(8)).[2] They were sentenced as follows: Frank Romano was fined $10,000 on Count One and sentenced to imprisonment for three years on each of Counts One, Two and Three, to run concurrently; John Ottiano was fined $5,000 on Count One and sentenced to concurrent two year terms of imprisonment on each of Counts One, Two and Three; Antonio Vellucci was fined $1,000 on Count Two and sentenced to imprisonment for two years on Counts Two and Three, to run concurrently; Edward Romano was fined $10,000 on Count Two and sentenced to concurrent three year terms of imprisonment on Counts Two and Three (II R. 829–836).

The court of appeals reversed the convictions of Frank Romano and John Ottiano on Counts One and Two, on the ground that the presumptions embodied in 26 U.S.C. 5601(b) (1) and (4), which were incorporated in the trial court's instructions, were unconstitutional (Pet. App. 34–37). It affirmed the convictions of Edward Romano and Antonio Vellucci on Count Two, and the convictions of all of the petitioners

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[2] Samuel L. Cohen, Israel Yarchin and the Griswold Corporation were also named as co-defendants in Counts Two and Three of the indictment. Judgments of acquittal were entered as to Cohen and the Griswold Corporation, and the charges contained in the indictment against Yarchin were dismissed after he entered a plea of guilty to violating 26 U.S.C. 5686 (possession of any liquor or property in violation of any of the provisions of the Internal Revenue Code).

on the conspiracy charge (Count Three), holding that the trial court had made it clear in its instructions that the statutory presumptions were limited in application to the two substantive counts and then only to those persons present at the still at the time it was discovered (Pet. App. 37).

1. Hearings on motions to suppress evidence were held prior to trial. The evidence adduced showed that on October 5, 1960, agents of the Internal Revenue Service were informed by Connecticut State police that the police had received information from a reliable informant that an illegal still was being operated on property, owned by the Griswold Corporation, known as Aspinook Mill in Jewett City, Connecticut. One of the federal agents contacted the informant who told him that he had detected the odor of mash at the premises in question (I R. 24). On the evening of October 10, 1960, two federal agents and a State policeman went to the property, a 42-acre tract composed of a large complex of industrial buildings. After gaining entry to the land through an opening in the fence which surrounded the premises on three sides, the officers made their way to, and entered, a vacant unlocked building which led to an open courtyard. There the officers detected the distinctive odor of fermenting mash coming from an adjacent structure, known as Building 9a. The officers then departed via their route of entry. Earlier that evening, another agent, using binoculars, who was posted on high ground overlooking the complex, had scanned the interior of Building 9a and observed a column still and other items used in the illicit distillation of alco-

hol. That same evening, an automobile fitting the description of a car belonging to John Ottiano, who had a reputation of being a violator of the liquor laws, was seen to drive up to the premises. I R. 21–25, 52–53, 63–64. No still was licensed for the premises.

Based upon the foregoing information, attested to in affidavits filed by two federal agents (John J. Shaw and Samuel Sushman), a search warrant for the premises was issued by the United States District Court for the District of Connecticut (I R. 21–27). Upon executing the warrant, on October 13, 1960, the officers found a 753 gallon capacity still in full operation and 9 mash vats containing approximately 5,756 gallons of mash. Additional paraphernalia used in the distillation process (*e.g.*, hundreds of "Knox" glass jugs and numerous bags of "Domino" sugar) were also discovered on the premises (see I R. 206–210, 226–229, 250). Petitioners Frank Romano and John Ottiano were found inside the building standing a few feet from the still (I R. 336–337). In Ottiano's pocket, the agents found the keys to the doors of the building. Both men informed the agents that they did not know how long the still had been in operation, Frank Romano adding that he had been at the premises for three days. He showed the agents how to turn off the still motor (I R. 213–214, 221, 239).

2. The evidence adduced at trial revealed that Antonio Vellucci's truck was outside the premises at the time the still was discovered by the officers, having been driven there by Ottiano; that this truck had been used on several prior occasions by both the Romanos to pick up "Knox jugs" and bags of "Domino"

sugar; that the truck had been seen at the still site carrying sugar; and that Edward Romano and John Ottiano had been seen at the still carrying a partition and a toilet found in the building at the time of the raid (see II R. 564–568; 619–620; 622–625; 715–721; 730–735).

ARGUMENT

1. On June 10, 1964, the government filed a petition for a writ of certiorari in the instant case (No. 172, O.T., 1964), requesting this Court to review that portion of the judgment of the court of appeals holding the presumptions contained in 26 U.S.C. 5601(b) (1) and (4) unconstitutional and for that reason reversing the convictions of Frank Romano and John Ottiano on Counts One and Two. As we pointed out in our petition, while one of the presumptions involved in this case—that created by subsection (b)(1)—is the same as that involved in *United States* v. *Barrett*, presently pending on a writ of certiorari to the Court of Appeals for the Fifth Circuit, 375 U.S. 962 (No. 13, O.T., 1964), the presumption created by subsection (b)(4)—not involved in *Barrett*—is independently sustainable regardless of the decision as to (b)(1).

If our petition is granted we do not oppose the grant of certiorari as to the question (which we list as number 1 and petitioners as number 5) whether reference to the presumptions in the instructions tainted the conspiracy convictions as well as the convictions of Edward Romano and Antonio Vellucci on Count Two. While we agree with the court below that the instructions, although not specific on this point, were so tailored as to sufficiently indicate to the jury

that it was not to consider the presumptions on the conspiracy count, nor on the substantive counts as to those petitioners not present at the time the still was raided, nevertheless, we recognize that the ruling of the court below suggests a conflict with the determination of the Fifth Circuit in *Barrett* v. *United States,* 322 F. 2d 292, 300, that, once the presumptions are included in the charge, they infect other unrelated counts, unless the trial judge specifically instructs as to their limitation.

We see no reason, however, for review of the other claims raised by the petition, which were fully canvassed and properly rejected by the court of appeals.

2. Petitioners argue that, since some of the information supporting the issuance of the search warrant was obtained as a consequence of a trespass, the warrant was invalid. As the court of appeals held, none of the petitioners have standing to complain of the trespass on the land and vacant building of the Griswold Corporation (Pet. App. 32–33). They did not own or possess any interest in the place where the trespass occurred and were not even present where the trespass took place. The trespass was on adjacent property from where the officers detected the odor of fermenting mash. *Jones* v. *United States,* 362 U.S. 257, which recognized the interest of a guest lawfully in the premises searched is thus inapplicable. In this case no right of privacy petitioners might have had in Building 9–A was invaded by agents travelling over an area where petitioners were not located and which was owned and possessed by the Griswold Corpora-

tion. See *Wong Sun* v. *United States*, 371 U.S. 471, 492.

Even if petitioners have standing to complain of the search and seizure,[3] there is no merit to their complaint because evidence obtained as a result of a simple trespass on land or in an unoccupied building is not thereby rendered inadmissible. *Hester* v. *United States*, 265 U.S. 57, 59; *United States* v. *Sorce*, 325 F. 2d 84, 86 (C.A. 7), certiorari denied, 376 U.S. 931. In any event, the visual information, obtained without any trespass by a government agent through the use of binoculars (see *supra* p. 4), was sufficient probable cause in and of itself to justify issuance of the warrant. See *United States* v. *Lee*, 274 U.S. 559, 563.

3. There is no merit to petitioners' contention (Pet. 16–17) that the government improperly destroyed some of the seized property. The government retained samples of the items destroyed, which were available for inspection by the defense, and the basic components of the still itself were not destroyed ~~stroyed~~ (I R. 193–196). Furthermore, photographs and movies of the site taken prior to dismantling and destruction were also available for inspection by the defense (I R. 298–306). In short, petitioners were in no way prejudiced by the destruction of the distilling paraphernalia found at the still site. Immediate destruction of illegal distilling apparatus is fully authorized by statute where it is impracticable to retain the equipment, 26 U.S.C. 5609. See *Ramsey* v. *United*

[3] The district court found that, while Edward Romano and Antonio Vellucci did not have standing, Frank Romano and John Ottiano did have standing under *Jones* v. *United States*, 362 U.S. 257, 262–263.

States, 245 F. 2d 295, 296–297 (C.A. 9). The magnitude of the distilling operation in this case made any other course impracticable (see I R. 206–210).

4. Petitioners allege a violation of the "Jencks Act," 18 U.S.C. 3500, in the refusal of the trial court to order the production, after the direct testimony of supervising agent Nadel, of statements made by other Internal Revenue agents which Nadel placed in the prosecutive file but did not utilize in making up his own statement (which was turned over to the defense) (I R. 322–324). The statements of other agents were not a proper basis for impeachment of Nadel.

5. There is no basis for petitioners' contention that prejudicial error resulted from the government's failure to provide that the testimony of all trial witnesses who testified before the grand jury be transcribed.[4] It is true that the Second Circuit has held that "[i]f the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial." *United States* v. *Giampa,* 290 F. 2d 83, 85 (C.A. 2). But this rule presupposes that a transcript of the grand jury testimony has been made and is in existence. Thus, in interpreting the rule it had enunciated in *Giampa,* the Second Circuit subsequently pointed out, "we there fashioned a duty for the United States Attorney only in those cases—as in Giampa itself—in which the grand jury proceedings

[4] There is no dispute that the government delivered all of the grand jury transcript that it had to the trial judge for an *in camera* inspection and that portions of such transcript were ultimately turned over to the defense (see *e.g.*, I R. 305–307; I R. 586).

have been transcribed and minutes actually exist. While the presence of a stenographer in the grand jury room to transcribe the witnesses' testimony would be the better procedure, there is no constitutional requirement that grand jury proceedings be transcribed, and we have been able to uncover no provision of rule or statute which makes transcription mandatory rather than permissive." *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (C.A. 2); see, also, *United States* v. *Labate*, 270 F. 2d 122, 123–124 (C.A. 3), certiorari denied *sub nom. Sussman* v. *United States*, 361 U.S. 900.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied except that, if the government's petition in Number 172 is granted, we do not oppose certiorari on question number 1 (petitioners' number 5).

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In the

Supreme Court of the United States

OCTOBER TERM — 1964

No. 123

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO,
ANTONIO VELLUCCI,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

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In the

Supreme Court of the United States

OCTOBER TERM — 1964

No. 193

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

On March 15, 1965, this Court denied the Petitioners' Petition for a writ of certiorari, and, on the same date granted the Petition of the United States. As a result of this action, each of the Petitioners has been surrendered to begin the service of sentence upon Count III (*Cf.* R. Vol. II, 829a, 831a, 833a, 835a*.

* References are to pages of record filed with original petition.

The Petitioners, individually, assert that the Court's determination not to consider the application for a writ of certiorari on Count III has created certain ancillary problems that were not heretofore presented.

In a collateral petition, No. 172, October Term, 1964, filed by the government, the following issue is raised:

> "Whether the presumptions established by Sections 5601 (b) (1) and (4) of the Internal Revenue Code, as here applied, satisfy the requirement of the due process clause of the Fifth Amendment."

This issue encompasses Counts I and II of the Indictment in the instant matter.* (*Cf.* R. 30a) Count III is a charge of conspiring to violate Count II. At the same time, the issues in Counts I and II of the Indictment were specifically excluded by the Court in its decision in *United States* vs. *Gainey*, #13, October Term, 1964, 33 L.W. 4200 *et seq.*

The government did not oppose the request for a writ of certiorari by these Petitioners. We recognize that this alone does not give an adequate basis for granting certiorari on the issues raised in Petitioner's Fifth Question presented. It did, we contend, recognize certain practical difficulties currently existing by reason of the denial of certiorari.

The judgment of commitment (R. 835a) shows that Petitioner Vellucci must stand committed until the fine imposed upon Count II is paid. As previously noted, Vellucci has been incarcerated upon the basis of a final determination under Count III. Pursuant to 18 U.S.C. § 4202, Vellucci would be eligible to seek parole after serving 120 days. In fact, to the date that this Petition for Rehearing is filed Vellucci will have

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* Reference is to Volumes in record submitted with original Petition.

already served 68 days of the time. Thus, while he would be eligible to apply for parole in 52 more days, he is faced with a committed fine on Count II. It may be that his parole eligibility will be materially affected by this fact.

The judgment of commitment of Edward Romano (R. 833a) shows that Romano must stand committed until the fine imposed upon Count II is paid. This Petitioner has actually served 115 days and would be eligible for parole after 250 additional days. The record in this case shows that the appellants' brief is due not later than August 25, 1965. Thus, appellee's brief must be filed by September 24, 1965. Since it is doubtful that this case will be the first considered for oral argument, it may be that oral argument may not be heard by December, 1965. Petitioner, Edward Romano, may be determined to be ineligible for parole — by reason of the fact that there has been no final determination of the issues presented to this Court — under 18 U.S.C. § 4202.

The Petitioners, John Ottiano and Frank Romano, are faced with the same general dilemma. (R. 829a, 831a) Ottiano and Romano have already served 115 days of their sentence. In 129 days, Ottiano would be eligible for parole. That is 4 days after the final date for filing Appellants' Brief. Frank Romano would be eligible for parole in December. In both situations, they may be determined to be ineligible for parole.

In addition, each of these Petitioners is permitted, pursuant to *Rule 35, Federal Rules of Criminal Procedure*, to request the District Court to correct or reduce the sentence imposed under Count III. The entire record of the case, however, is not before the District Court — nor will it be before the Court until there is a final determination of the issues covering Counts I and II. At the same time, the lack of finality of a decision may influence the Court not to consider the *Rule* 35 Motion favor-

ably. While it is improper to hypothecate upon the Court's determination, its capacity to modify on Count III may well expire within 60 days of the ruling on this application.

Petitioners have consistently contended that this case was confusing. The decision in the Court below (Appendix A, p. 37 of Petition) shows the case of confusion when the Court mixed the name of Vellucci with Ottiano to make John Vellucci an accused. Even the Solicitor General confused the Vellucci sentence in its memorandum in opposition to Petition for Bail. All of the issues raised in the dissenting opinions in *United States* vs. *Gainey*, #13, October Term, 1964, March 1, 1965, 33 L.W. 4200 (U.S.) militate toward just the issues that should properly be argued under Point 5 of Petitioners' presented questions. Conspiracy is the vegetable stew of criminal process. We contend that the presumption statute — once read to the jury — changes the fundamental law on every issue before that jury, whether it is explained away or given an adequate applicability explanation or not. Any charge that says to a jury — in effect — the defendant must explain why he was at a given place or you can find that lack of explanation evidence of his guilt requires a violation of the Sixth and Fifth Amendments.

Petitioners,

By W. PAUL FLYNN,
Their Attorney.

April 21, 1965

CERTIFICATE OF COUNSEL

I certify, pursuant to Rule 58 of this Court, that the above Petition is drawn in good faith, that good ground exists to support it and that the same is not interposed for delay.

CERTIFICATE OF SERVICE

This is to certify that (3) copies of the foregoing Petition were mailed, postage prepaid, to the Solicitor General of the United States and the United States Attorney for the District of Connecticut, on April 22, 1965.